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OCTOBER TERM, 1990

HARRIET PAULEY, SURVIVOR OF JOHN C. PAULEY,
PETITIONER

v.

BETHENERGY MINES, INC., AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

CLINCHFIELD COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
AND JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
AND ALBERT C. DAYTON

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND FOURTH CIRCUITS

REPLY BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

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The Black Lung Benefits Act provides benefits "to those who have become totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 108 (1988), citing *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 141 (1987). See also 30 U.S.C. 921(a), 922(a)(1), 932(c) (provisions authorizing the payment of benefits for total disability or death "due to pneumoconiosis"). The third and fourth rebuttal methods contained in DOL's presumption regulation, which are at issue in these consolidated cases, ensure consideration of all of the statutory elements of entitlement by allowing a party contesting entitlement to prove that the miner did not have pneumoconiosis or did not become totally disabled from the disease. 20 C.F.R. 727.203(b)(3) and (4).

The claimants argue that Congress, by providing in Section 402(f)(2) of the Act that DOL's "[c]riteria * * * shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973" (30 U.S.C. 902(f)(2)), required DOL to ignore whether a miner had pneumoconiosis or whether his disability was caused by the disease. Thus, Dayton and Taylor contend that a miner who does not have pneumoconiosis, but is unable to do coal mine work because of a reduced ventilatory capacity resulting solely from age, obesity, or cigarette smoking, is entitled to black lung benefits. In Pauley's view, if a working miner with simple pneumoconiosis becomes totally disabled due to a non-work related cause such

as a heart attack or an automobile accident, the coal industry has to pay him black lung benefits.

The claimants have not shown that they would have obtained benefits on June 30, 1973, under the "criteria" applied by HEW, which administered the program at that time. In any event, they have failed to show that Congress intended to mandate such results, and serious constitutional problems would be presented by requiring the coal industry to pay black lung benefits to miners who do not have the disease or are not disabled by it.

1. *Criteria applied by HEW.* In our opening brief we recognized (Br. 16) that it is not clear exactly how HEW applied its opaque presumption regulation. 20 C.F.R. 410.490. In our view, however, in order to invoke HEW's presumption, claimants first had to establish the existence of a respiratory or pulmonary impairment (subsection (b)(1)), and next had to show that their disability was due to pneumoconiosis (subsection (b)(2)). The burden of showing that the miner was not totally disabled then shifted to the person challenging entitlement to benefits.[1]

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[1] The presumption was useful to claimants, as a practical matter, because the proof required to establish the existence of an impairment under subsection (b)(1) did not necessarily show an impairment that was severe enough to cause total disability. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976) (simple pneumoconiosis, evidence of which satisfies subsection (b)(1)(i), is seldom disabling); *Black Lung Benefits Act Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-275 (1977) (testimony of Dr. Harold I. Passes, former Acting Chief Medical Officer of the Bureau of Hearings and Appeals of the Social Security Administration) (the ventilatory test values set out in subsection (b)(1)(ii) do not prove total disability).

a. Dayton acknowledges (Br. 26) that subsection (b)(2) of HEW's regulation, which states that the claimant must show that "[t]he impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment," required the claimant to prove that the miner's impairment was caused by pneumoconiosis.[2] Thus, Dayton appears to agree that the question whether he has pneumoconiosis is critical to his claim. Yet Dayton then contends that subsection (b)(3) of HEW's regulation, which states that a miner presenting qualifying ventilatory study scores "will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment * * * if he has at least 10 years of the requisite coal mine employment," would have allowed him to avoid the requirements set out in subsection (b)(2). In Dayton's view (Br. 26), subsection (b)(3) "is not a third co-equal invocation requirement but * * * is a means of satisfying the causation requirement" of subsection (b)(2). Thus, under Dayton's construction of subsection (b)(3), a miner with the requisite experience who presented qualifying ventilatory study scores was *conclusively* presumed by HEW to suffer from pneumoconiosis.[3] By this sleight of hand, Dayton claims that the

[2] Congress defined "pneumoconiosis" to mean "a chronic dust disease * * * arising out of coal mine employment." 30 U.S.C. 902(b). Because a claimant had to show that a miner's respiratory or pulmonary impairment "arose out of coal mine employment" under subsection (b)(2), that subsection required claimants to prove that the miner had "pneumoconiosis" as defined by the Act.

[3] Dayton repeatedly refers to "conclusive presumptions" in HEW's regulation or alternatively states that claimants were "conclusively presumed" under the regulation to satisfy an element of entitlement. See Br. 4, 11, 15, 25 n.6, 32, 33 & n.21.

Fourth Circuit correctly held that whether he has pneumoconiosis "is superfluous and has no bearing on the case." 90-114 Pet. App. 7 n.*.

Since it has been determined that Dayton does not have pneumoconiosis (90-114 Pet. App. 11-12, 24-26), his entire argument hinges on his claim that he would have had the benefit of a conclusive, or irrebuttable, presumption. HEW's regulation, however, does not state that anything was *conclusively* presumed. HEW's Manual stated, to the contrary, that a miner in Dayton's precise circumstances would not be awarded benefits if there was "evidence that *rebuts* * * * a finding" that he is "totally disabled due to pneumoconiosis." Coal Miner's Benefits Manual (Pt. IV), Temp. Instr. No. 21, § 1B6(d) (1972) (emphasis added). Thus, HEW did not regard its regulation as establishing a conclusive presumption of entitlement to benefits. And evidence that a miner does not have pneumoconiosis necessarily rebuts the presumption that he is disabled by it.[4]

Furthermore, and most fundamentally, Dayton never comes to grips with the fact that he seeks black lung benefits even though it was determined that he does not have black lung disease. There is no good

[4] Our construction of the regulation gives meaning to subsection (b)(3). That subsection allowed a miner with only ten years' experience to invoke the presumption on the basis of ventilatory study scores. In the absence of subsection (b)(3), a claimant relying on ventilatory studies would have been required to show 15 years of coal mine work, as stated in subsection (b)(1)(ii). HEW apparently set out the 15-year requirement established by 30 U.S.C. 921(c)(4) in subsection (b)(1)(ii), and then implemented Congress's instruction not to apply the 15-year requirement rigidly (S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972)), by lowering the requirement to ten years in subsection (b)(3).

reason to think that HEW would have awarded benefits in such a case.[5]

b. Pauley had simple pneumoconiosis and was disabled, but his "disability did not arise even in part out of coal mine employment." 89-1714 Pet. App. 13. With respect to DOL's fourth rebuttal method, Pauley acknowledges (Br. 20) that, in x-ray cases such as his, although the method "lacks a discrete companion test in the HEW interim provision, it does not set forth more restrictive criteria than those in the HEW interim provision." However, Pauley contends that DOL's third rebuttal provision, which provides for rebuttal where "[t]he evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment," is invalid. Where Dayton and Taylor find a conclusive presumption of pneumoconiosis in HEW's regulation, Pauley finds a conclusive presumption of "disability causation," by which he means that the miner was

[5] Nor does Taylor, who like Dayton was found not to have black lung disease (90-113 Pet. App. 18a-19a, 27a-31a), suggest why he should be entitled to benefits. Taylor instead merely adopts Dayton's arguments (Br. 7) and goes on to argue that he is entitled to benefits even though he invoked DOL's presumption by presenting blood-gas studies, a method of invocation that was not available under HEW's regulation. Taylor's argument, in summary, is that he should be deemed to have constructively invoked HEW's presumption since blood-gas studies, like ventilatory test scores, show the presence of a chronic respiratory or pulmonary impairment. There is no merit to this argument. The evidence in Taylor's case showed *non-qualifying* x-ray evidence and ventilatory study scores (90-113 Pet. App. 27a), and his blood-gas study scores do not change that fact. Since it is undisputed that Taylor would not have qualified for benefits under HEW's regulation, it should be undisputed that DOL's regulation is not "more restrictive" as applied in his case.

rendered disabled by pneumoconiosis rather than from some other disease or from an injury.[6]

The premise for Pauley's argument is that early in its administration of the black lung program, HEW supposedly decided to eliminate any inquiry into the cause of a miner's disability because doing so was too difficult. 89-1714 Pet. Br. 3-6, 28-30. In fact, however, HEW required in the early years of its administration that pneumoconiosis had to be the "primary reason" for a miner's disability. 20 C.F.R. 410.403(b) (1972); GAO, *Report to the Congress, Achievements, Administrative Problems, and Costs in Paying Black Lung Benefits to Coal Miners and Their Widows* 26 (1972) [*1972 GAO Report*]. HEW did not apply this rule harshly: "Although the weight of medical opinion holds that pneumoconiosis is seldom the cause of disabling impairment until and if it reaches the complicated stage," HEW generally granted benefits "where the X-ray evidence discloses only first-stage (simple) pneumoconiosis accompanied by severe impairment of breathing." H.R. Rep. No. 460, 92d Cong., 1st Sess. 25 (1971) (minority views).[7] But HEW denied benefits where it was clear that the miner's death was not caused by pneumoconiosis. Thus, HEW "almost always denied" benefits where a death occurred less than 24 hours after the

[6] Like Dayton, Pauley repeatedly speaks of a "conclusive presumption" in HEW's regulation or says that disability causation was "conclusively presumed" (see Br. 15, 22, 40 n.25), even though nothing in the regulation suggested that it established irrebuttable presumptions.

[7] Pauley quotes from this report (89-1714 Pet. Br. 5) in support of his contention that it is "a very difficult problem from a medical standpoint" to determine the cause of disability, without noting that he is relying on the *minority* views.

onset of an acute disease such as a "coronary occlusion[]" (*1972 GAO Report* 36), or where a miner died "in an automobile accident," or from "malignancy in other organs of the body" (*Black Lung Legislation, 1971-72: Hearings Before the Subcom. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st & 2d Sess. 524, 539-540 (1972) [*1972 Senate Hearings*]). There is no reason to believe HEW would have ignored the statute and granted benefits if the evidence showed, for example, that a heart attack or an automobile accident had disabled a miner.[8]

Nor has Pauley shown that HEW responded to the 1972 amendments by ignoring the statutory requirement that benefits should be awarded only in cases

[8] Pauley's speculation that HEW decided to abolish the disability causation inquiry based on a cost-benefit analysis is faulty even on its own terms. Determining the cause of a miner's disability is not "virtually impossible," as Pauley repeatedly asserts (Br. 3, 6, 16, 28, 29) on the basis of a quote from an official in the Social Security Administration. Doctors can identify the cause of a miner's lung impairment to a reasonable degree of medical probability, as they do under state workers' compensation laws. *1972 Senate Hearings* 166 (statement of Dr. Rankin); see also *Underhill* v. *Peabody Coal Co.*, 687 F.2d 217, 223 (7th Cir. 1982) (allowing black lung rebuttal under a "reasoned medical judgment" standard). Where a disabled miner with pneumoconiosis also suffers from a non-pulmonary disease, it is even easier to determine the cause of the miner's disability. To the extent that identifying the cause of a disability is difficult, DOL's regulation fully protects miners' interests by requiring the party contesting entitlement to prove that the disability did not arise even "in part" from coal mining. 20 C.F.R. 727.203 (b)(3). Pauley has failed to contest the ALJ's finding that her husband's disability arose from arthritis and paralysis from a stroke, and not in whole *or in part* from pneumoconiosis.

where death or disability was caused by pneumoconiosis. Those amendments, after all, created a presumption in Section 411(c)(4) for certain long term miners who had a totally disabling respiratory or pulmonary impairment, and expressly *conditioned* the presumption by allowing for rebuttal by proof that a miner's "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. 921(c)(4). Indeed, it would have been perverse for HEW to react to the congressional enactment of an explicit disability causation condition by eliminating such a requirement from the regulations implementing the statute. In our view, subsection (b)(2) of HEW's regulation, which states that the claimant must show that "[t]he impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment," incorporated the disability causation requirement.

Subsection (b)(2) can be read as merely establishing a "disease causation" requirement—a requirement that the claimant establish that his respiratory impairment was caused by exposure to coal mine dust rather than some other type of dust. But there are a number of good reasons to read subsection (b)(2) as including a disability causation requirement as well. First, the language of the subsection—"[t]he impairment * * * arose out of coal mine employment"—naturally may be read that way. Moreover, that language seems to have been borrowed from Section 411(c)(4)—which allows for rebuttal where the "impairment did not arise out of, or in connection with, employment in a coal mine." Such borrowing is likely

[9] The fact that Congress in 1972 included a disability causation provision in Section 411(c)(4) further undercuts Pauley's argument that it was thought to be virtually impossible to determine the cause of a miner's disability.

to have occurred since the regulation containing subsection (b)(2) was promulgated in 1972 shortly after the enactment of Section 411(c)(4). Because Section 411(c)(4) indisputably establishes a disability causation requirement, it is reasonable to construe subsection (b)(2) similarly.[10]

In addition, HEW's manual implemented subsection (b)(2) by stating that a miner was "*presumed* to be totally disabled due to pneumoconiosis arising out of coal mine employment * * * if he has at least 10 years of underground or comparable coal mine employment * * * and there is no evidence that *rebuts* such a finding." Section IB6(d). Evidence that a miner's disability is *not* due to coal mine employment obviously rebuts that presumption. Moreover, construing the regulation as a conclusive presumption of disability causation puts the regulation at odds with the statute, which repeatedly makes clear that black lung benefits are to be awarded to persons whose disability is "due to pneumoconiosis." 30 U.S.C. 901(a), 921(a), 922(a)(1), 932(c). And Pauley's construction leads to absurd results: under it, a miner would be entitled to black lung benefits even if it were clear that his disability resulted from a traffic accident that was totally unrelated to his employment.[11] Finally, as discussed below, the adop-

[10] The Conference Committee that adopted Section 402 (f)(2) stated that "all standards are to incorporate the presumptions" set out in Section 411(c)." H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978).

[11] Pauley suggests (Br. 15-16) that her construction is supported by the fact that no reported case has been located in which HEW denied benefits in such circumstances. Dayton similarly notes (Br. 32) that no case held that HEW could not award black lung benefits to persons who did not have black lung disease. But it may be that no one thought to pursue a claim for black lung benefits in such circumstances. That conclusion is supported by the fact that no one challenged the validity of DOL's rebuttal provisions for nearly ten years. See *Consolidation Coal Co.* v. *Smith*, 837 F.2d 321, 323 & n.3 (8th Cir. 1988) (Benefits Review Board raised the issue sua sponte); *Sebben*, 488 U.S. at 119 (the claimants conceded the validity of DOL's rebuttal provisions).

tion of Pauley's construction would lead to a serious due process problem if coal companies were required to pay black lung benefits even where they could show that a miner's disability is totally unrelated to his employment.[12]

c. It may be that no interpretation of HEW's regulation can make total sense of it. The regulation was not drafted with precision. While we believe HEW's regulation authorizes rebuttal by the methods explicitly set forth in DOL's third and fourth provisions, HEW's regulation admittedly does not do

[12] Clinchfield and Consolidation Coal suggest (Br. 28 n.34) that HEW's presumption regulation would not have been particularly useful if subsection (b)(2) included a disability causation inquiry. That is not so. First, while HEW's manual is not clear on this point, HEW may have shifted the burden of persuasion to the party contesting eligibility with respect to the disability causation issue, even though subsection (b)(2) is in the invocation portion of the regulation. See Manual Section IB6(d). Second, under our reading, the regulation creates a presumption that a miner presenting the requisite x-ray or ventilatory study evidence suffers from a *totally* disabling impairment, and in subsection (b)(2) authorizes the party contesting eligibility to show that coal mine employment was not the cause of the miner's total disability; if the party contesting eligibility cannot do so, then that party may attempt to rebut the presumption under subsection (c) by showing that the miner is not, in fact, totally disabled. Under this reading of the regulation, a miner may obtain its key benefit—a presumption of total disability based on medical evidence that merely shows an impairment. See note 1, *supra*.

so as clearly.[13] But DOL officials reported shortly after the passage of the 1978 amendments that HEW did not consider its two express rebuttal provisions to be exclusive. 43 Fed. Reg. 36,826 (1978).[14] DOL proposed the presumption regulation at issue less than two months after the enactment of Section 402(f)(2). 43 Fed. Reg. 17,765, 17,771 (1978).[15]

In these circumstances, it is best to presume, as the Third Circuit did, that HEW's regulation complied with the statute by allowing the equivalent of DOL's third and fourth rebuttal methods. Whether, under HEW's regulation, the inquiries into disabil-

[13] While agreeing with us that HEW's regulation allowed for rebuttal by methods comparable to DOL's third and fourth methods, Consolidation and Clinchfield Coal come to that conclusion somewhat differently. The coal companies join us in arguing that subsection (b)(2) requires proof that the miner has pneumoconiosis. But they conclude (as did the Third Circuit) that HEW's regulation authorizes a disability causation inquiry by tracing through the cross-references in subsection (c). The cross-referenced regulation provides that a miner would be considered totally disabled if "pneumoconiosis prevents him" from engaging in specified work. 20 C.F.R. 410.412(a)(1). As the coal companies and the Third Circuit state, that regulation thus seems to incorporate a disability causation inquiry.

[14] DOL did not state whether HEW authorized additional forms of rebuttal under subsection (b)(2), as its manual provides (§ IB6(d)), or under subsection (c), as the cross-references in that provision would allow.

[15] The claimants argue that DOL's interpretation of Section 402(f)(2) should receive no deference. But the Secretary's contemporaneous construction of the statute was that Congress had authorized DOL's third and fourth rebuttal methods and HEW's regulation did not foreclose them. We believe this construction is entitled to deference, and that such deference is not precluded by the ambiguities in HEW's regulation.

ity causation took place before or after invocation, with ten years of coal mining or with 15, and with or without a shift of the burden of persuasion is irrelevant because DOL's regulation gives claimants the benefit of the doubt on each of these issues, and therefore is not more restrictive than HEW's regulation.

2. *Congressional intent.* In our opening brief, we showed that because Congress in Section 402(f)(2) required DOL to apply criteria "not * * * more restrictive than [those] *applicable to* a claim filed on June 30, 1973" (emphasis added), the ultimate question is what criteria Congress understood to apply to Part B claims, not what criteria HEW actually applied. We also showed that Congress must have understood that Part B claims would be denied where a miner was not totally disabled "due to pneumoconiosis," and that a contrary construction of Section 402(f)(2) posed serious constitutional problems.

a. Pauley appears to believe (Br. 37-38) that HEW's regulation is all that matters, and that Part B of the Act is essentially irrelevant in construing Section 402(f)(2). Dayton admits (Br. 32) "that, for purposes of Section 402(f)(2) analysis, the central question is what 'criteria' were 'applicable' under Part B (and under the HEW interim provision in particular), not what criteria HEW actually applied." Yet in Dayton's view (Br. 33), what HEW thought is all that matters because the agency's construction of the statute is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

The *Chevron* standard does not allow an agency to override an act of Congress. To the contrary, a regulation is invalid, despite the deference due under

Chevron, where the regulation is "contrary to the statute." 467 U.S. at 844. "If the intent of Congress is clear, that is the end of the matter." *Id.* at 842. It is where "the statute is silent or ambiguous with respect to the specific issue" that the question becomes whether "the agency's answer is based on a permissible construction of the statute." *Id.* at 843. See *Public Employees Retirement System* v. *Betts*, 109 S. Ct. 2854, 2863 (1989) ("no deference is due to agency interpretations at odds with the plain language of the statute itself"). Congress stated that the purpose of the Black Lung Benefits Act is to provide compensation for "death or total disability due to pneumoconiosis." 30 U.S.C. 901(a). In Part B of the Act, Congress authorized HEW to promulgate regulations providing for "payments of benefits in respect of total disability of any miner due to pneumoconiosis." 30 U.S.C. 921(a). Congress further enacted the presumption in Section 411(c)(4), 30 U.S.C. 921(c)(4), which evpressly provides for rebuttal by proof that a miner does not have pneumoconiosis or is not totally disabled as a result of the disease. In the next section of Part B, Congress set forth rate schedules for benefits to be paid "[i]n the case of total disability of a miner due to pneumoconiosis." 30 U.S.C. 922(a)(1). If HEW's regulation made it irrelevant that a miner was not disabled due to pneumoconiosis, the regulation was contrary to the statute.[16]

[16] Pauley suggests (Br. 39) that "Congress elevated the HEW interim provision to statutory status when it decreed in Section 402(f)(2) that the HEW interim provision set the *statutory* standard of restrictiveness for the 'criteria' the Secretary of Labor could apply." But that is not what Section 402(f)(2) says. Moreover, Pauley admits (Br. 44 n.28) that "a review of the legislative history reveals a decided silence with respect to whether members of Congress were aware or not that the HEW interim provision lacks a 'disability causation' test." In other words, nothing shows that Congress thought black lung benefits had to be awarded to a miner who was not totally disabled due to pneumoconiosis.

Moreover, in creating a regime of statutory rebuttable presumptions in Section 411(c), which is in Part B of the Act, Congress must have understood that rebuttability principles applied generally under Part B. The exception to that rule was the irrebuttable presumption set forth in Section 411(c)(3), 30 U.S.C. 921(c)(3), which provides that claimants presenting x-ray, biopsy, or autopsy evidence of complicated pneumoconiosis are entitled to benefits. But Section 411(c)(3), unlike HEW's regulation, explicitly states that it creates an "irrebuttable" presumption. And even with respect to that provision, this Court held in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 22 n.21 (1976), that a statutory gloss was required to make clear that "an operator can be liable only for pneumoconiosis arising out of employment in a coal mine." Congress was surely aware of this Court's 1976 decision in *Turner Elkhorn* when it enacted Section 402(f)(2) in 1978, and it must have understood that to the extent causation requirements were not expressly set forth in HEW's presumption regulation, such requirements were implicitly imposed by the statute and the Constitution.

b. As the decision in *Turner Elkhorn* also shows, our construction of Section 402(f)(2) is supported by the need to avoid a serious constitutional question concerning the validity, under the Due Process Clause, of imposing liability on coal mine operators for disabilities that do not arise out of coal mining. The claimants attempt to avoid this question by construing Section 422(c), 30 U.S.C. 932(c), to allow individual coal mine operators to escape liability for

benefits in cases where total disability was not "due to pneumoconiosis," while preserving a claimant's eligibility for benefits by shifting liability to the Black Lung Disability Trust Fund in such cases. 89-1714 Pet. Br. 45-46; 90-114 Resp. Br. 45. This attempt not only misconstrues the purpose of Section 422(c), but also fails to eliminate the constitutional problem.

Section 422(c) provides rules that govern coal industry responsibility for black lung benefits. In general, individual coal mine operators are liable, but in certain circumstances liability shifts to the Black Lung Disability Trust Fund, which is financed by a tax on coal. See 30 U.S.C. 932(c), 934; 26 U.S.C. 4121(a), 9501.[17] There is no indication in this apportionment of liability scheme that different adjudicatory rules apply depending on whether the Trust Fund or an individual operator is liable for benefits. To the contrary, Section 422(a), 30 U.S.C. 932(a), appears to provide that the same rules and procedures will apply to the operators and the Trust Fund. The claimants' creation of different rules depending on whether benefits are paid by the Trust Fund or an individual operator has no basis in the statute, which does not hint that the Trust Fund would be required to pay benefits to miners who are not totally disabled due to pneumoconiosis.

Even if the claimants' interpretation of Section 422(c) made sense, however, it would still not eliminate the constitutional question arising from their reading of the statute. Their interpretation would only change the constitutional question from whether Congress could impose liability on individual coal mine operators for disabilities unrelated to coal mining to whether Congress could impose such liability on the industry as a whole through an industry-financed trust fund. That latter question would require this Court to consider the continuing vitality of *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330, 334 (1935) (invalidating a law requiring an industry-financed trust fund, administered by the government, to pay pensions to former railroad employees).

[17] For example, the Trust Fund pays benefits where disability "did not arise, at least in part, out of employment in a mine during a period after December 31, 1969 when it was operated by such operator" (30 U.S.C. 932(c)(1)), and where the responsible operator fails to make payments (26 U.S.C. 9501(d)(1)). If the responsible operator fails to make payments, a lien on the operator's property is created in favor of the government. 30 U.S.C. 934(b)(2).

For these reasons and the reasons stated in our opening brief, the judgment of the Third Circuit in No. 89-1714 should be affirmed, and the judgments of the Fourth Circuit in Nos. 90-113 and 90-114 should be reversed.

Respectfully submitted.

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